In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-271

LOUIS ANTHONY FRESTA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); of conspiring to import heroin, in violation of 21 U.S.C. 952(a); and of aiding and abetting travel in interstate commerce to facilitate an unlawful activity, in violation of 18 U.S.C. 2 and 1952. He was sentenced to concurrent terms of five and ten years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 61-63). Petitioner contends that the district court erred in allowing the government, before establishing petitioner's involvement in the conspiracy, to present hearsay statements made by petitioner's co-conspirators, and that the district court erred in finding that independent evidence showed such an involvement.

The evidence at trial, which consisted primarily of testimony from law enforcement officials and tape recordings of conversations between the conspirators, which had been intercepted pursuant to court orders under 18 U.S.C. 2510, *et seq.*, revealed that petitioner and Gaetano Licata, as well as two unindicted co-conspirators, Pasquale Falcone and Frank Dasti, conspired to smuggle a substantial quantity of heroin from Canada.[1] The conspiracy culminated in Licata's arrest on December 18, 1972, as he attempted to enter the United States from Canada with some twenty-one pounds of heroin in his possession (2 T. 55-57; 3 T. 23-24).[2]

The jury heard a series of recorded conversations between Licata and petitioner and between Licata and Falcone, in which the conspirators used code or "street talk" in their discussions. A federal narcotics agent was then qualified as an expert, and he interpreted certain cryptic portions of the conversations in which the participants used terms such as "a big band," "$25 per head," and "brown floor tile." According to the agent, the second conversation the jury heard involved a discussion between Licata and petitioner concerning a potential purchase of a large quantity of heroin. The gist of the conversation, in the agent's opinion, was that Licata was telling the defendant that the people who were going to finance the purchase were dickering as to the price to be paid (1 T. 98-99, 103).

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[1]Falcone and Dasti were separately tried and convicted in the United States District Court for the District of New Jersey. See Pet. App. 42, n. 2. Licata was tried and convicted in Canada, where he is presently serving a twenty-five year sentence. See Pet. App. 42, n. 1.

[2]"T." refers to the four-volume trial transcript.

In a subsequent conversation, petititioner and Licata discussed buying "brown floor tiles" at 7¢ a block and selling them at 8¢. According to the agent, they were again using code to disguise the fact that this was a discussion of a potential purchase of heroin (2 T. 91-94).

In a conversation on December 11, 1972, Licata, in an apparent reference to petitioner's identification papers, indicated that he was going to need petitioner's "things" because "I already registered your name"; petitioner agreed but warned that "you just got to be careful" (Pet. App. 57-58).

On December 14, 1972, Licata and Falcone flew to Montreal from New York. Licata's reservation was in petitioner's name. Upon arriving in Montreal they took a taxi to the Smith DuPont Bar, where they met Frank Dasti, whom Canadian authorities had been investigating as a suspected heroin trafficker. Dasti drove them back to the airport in Montreal, and they returned to New York (2 T. 43-44; 3 T. 21).

On the following morning Licata called petitioner and told him that he had to see him, that "it's very important." Licata also wanted to borrow petitioner's suitcases (Petitioner's C.A. App. 186-187).[3] Shortly thereafter, petitioner and Licata placed the suitcases in Licata's car (*id.* at 161; 2 T. 49).

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[3]We are lodging with the Clerk of this Court a copy of petitioner's Court of Appeals Appendix, which includes transcripts of the intercepted conversations in which petitioner was a participant.

That afternoon, Licata left for Canada by automobile. While there, he registered in petitioner's name at the hotels in which he stayed (2 T. 85; 3 T. 25). When he attempted to leave Canada on December 18, 1972, his car was searched and approximately ten kilograms of heroin were seized from behind the seat (2 T. 55-57; 3 T. 23-24). Licata had petitioner's driver's license and social security card in his wallet (3 T. 31).

1. The rule is well established that, pursuant to the so-called co-conspirator exception to the hearsay rule, declarations of a co-conspirator made in furtherance of the conspiracy are admissible against a defendant who was not present when they were made, so long as there is independent proof of the conspiracy and the defendant's part therein. *E.g., Glasser* v. *United States*, 315 U.S. 60, 74. Petitioner contends, however, that it was error for the trial court to allow the government to play recordings of conversations between conspirators other than petitioner prior to the government's production of independent evidence of the conspiracy and his connection therewith.[4]

Every circuit that has considered this question has held, contrary to petitioner's contention, that the order of proof in such circumstances is within the trial court's discretion.[5] *E.g., United States* v.

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[4]The second tape played was in fact the one in which petitioner and Licata discussed the purchase of heroin. The first tape the jury heard was a short, rather innocuous conversation between Licata and Falcone for which no expert testimony was offered. Thus, independent evidence of petitioner's involvement in the conspiracy was in fact presented prior to almost all the hearsay declarations.

[5]Petitioner's assertion (Pet. 32-33) that the Third Circuit, in *United States* v. *DeCavalcante*, 440 F. 2d 1264, "stated that the determination of the conspiracy's existence and the particular parties' membership therein must precede any introduction of the hearsay statements" is inaccurate. The question of the order of proof was not there in issue, and the court made no such assertion.

Geaney, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied sub nom. *Lynch* v. *United States*, 397 U.S. 1028; *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060; *United States* v. *Acuff*, 410 F. 2d 463, 466 (C.A. 6), certiorari denied, 396 U.S. 830; *United States* v. *Halpin*, 374 F. 2d 493, 495 (C.A. 7), certiorari denied, 386 U.S. 1032; *Fabian* v. *United States*, 358 F. 2d 187, 192 (C.A. 8), certiorari denied, 385 U.S. 821; *United States* v. *Castanon*, 453 F. 2d 932, 934 (C.A. 9), certiorari denied, 406 U.S. 922; *Beckwith* v. *United States*, 367 F. 2d 458, 460 (C.A. 10). In the instant case there was no abuse of discretion in the trial court's decision to allow the government to play the tapes in chronological order.[6]

2. Petitioner also contends that the independent evidence was insufficient to support the finding necessary to the admissibility of the hearsay statements that petitioner was involved in a conspiracy. This claim is without merit.

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[6]Contrary to petitioner's suggestion (Pet. 21), *Bruton* v. *United States*, 391 U.S. 123, is not applicable to this case. In *Bruton*, this Court held that instructions requiring the jury to disregard a co-defendant's confession in considering the defendant's guilt or innocence were not sufficient to protect the defendant against prejudice. The principal basis of that ruling was of course the fact that the confession was not admissible against the defendant. In contrast, the hearsay statements of petitioner's co-conspirators were admissible against petitioner (see pp. 5-8, *infra*), and there was therefore no need even for the kind of limiting instruction given in *Bruton*. See *Dutton* v. *Evans*, 400 U.S. 74. Petitioner's argument, therefore, presumably is that the trial judge himself, in making a subsequent determination whether a defendant's involvement in a conspiracy was established by independent evidence, would be unable to separate the evidence already received and ignore damaging hearsay statements of co-conspirators. We do not believe that such a segregation would be intellectually difficult; the district court below (Pet. App. 40-60) apparently experienced no difficulty in so proceeding.

We rely upon the findings of the district court (Pet. App. 53-59):

> This Court is convinced that the Government established by substantial evidence, independent of the hearsay, the existence of the conspiracy to import heroin into the United States from Canada. The Government presented evidence of Licata's three vehicular excursions to New York City and the final trip to Canada which terminated abruptly when Canadian authorities intercepted the vehicle and uncovered therein twenty-one pounds of heroin. There was testimony as to Licata's association with Pasquale Falcone in connection with the two flights to Canada via Air Canada, only one of which actually resulted in a flight to Montreal, Canada. The Canadian police officer testified concerning the meeting of Licata, Falcone, and Dasti in the Montreal bar just a few days before Licata was apprehended with the heroin in his possession. The Government showed by uncontradicted evidence that Fresta furnished Licata with two suitcases, his driver's license, and Social Security card before Licata left for Canada. In addition, the fact of the frequent telephone contacts between Fresta and Licata and between Licata and Falcone (exclusive of the hearsay content of such calls) points out the close confederacy of these persons. When all the evidence is viewed in conjunction, the existence of the conspiracy is clearly established.
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> Similarly, the Government introduced sufficient evidence to connect Fresta to the unlawful venture. As indicated above, Fresta supplied Licata with the driver's license, Social Security card and suitcases to enable Licata to travel to Canada.

These two individuals were in each other's company and conversed over the telephone frequently during the brief period in which the events now under scrutiny occurred. Finally, certain of the incriminating statements made by Fresta over the telephone (*e.g.*, "I'm going to try to sell it for 9c"; "See if they sing a song Lil, you know what I mean", "I don't think the guy is going to want to go there", "I mean, you know, how is it if my floor — I mean, is it?") are examples of Fresta's own admissible conduct indicating his involvement in the enterprise. The defendant's own conversations were without exception couched in terms that bordered between code and a cautious awareness that his participation could be viewed as being incriminating. For example, it is perfectly plain that the defendant's own statements in conversations in which he took part establish that at the heart of his communication with Licata was some kind of profit-making business transaction, as opposed to a social, recreational or other objective. Further, the fact that reference to a 50-piece band to play before 50,000 people at $25 a head was intended to convey information in respect to the purchase of a quantity of heroin at a certain rate per kilo is evidenced in the conversation of December 2, 1972, at 5:28 p.m. where Fresta and Licata dropped their guard in respect to their code-type of conversation by referring to the alleged musical enterprise in terms of "quantity."

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Also, the * * * excerpt between Licata and Fresta in their conversation of December 11, 1972 at 12:42 p.m. discloses the connection with the identification materials furnished by the defendant, Fresta, together with an awareness of some sort of apprehension.

The court then ended its findings with the correct declaration that the evidence was "clear, unmistakable, and well within the range to allow reception into evidence the acts and hearsay statements of the co-conspirators" (Pet. App. 59).[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[7]Petitioner contends further that the instant decision is inconsistent with another Third Circuit case, *United States* v. *Cades*, 495 F. 2d 1166. The court there, in evaluating a conviction for aiding and abetting the misapplication of bank funds, indicated that evidence of attempts to conceal his behavior or to profit from it were important in determining whether the evidence was sufficient to support the conviction.

Petitioner's claim that these tests were not met here is insubstantial. Petitioner's behavior satisfies both tests. As the district court said (Pet. App. 56-57): "* * * it is perfectly plain that the defendant's own statements in conversations in which he took part establish that at the heart of his communication with Licata was some kind of profit-making business transaction, as opposed to a social, recreational or other objective." Moreover, the use of the "code" or "street talk" was obviously an attempt on his part to conceal the illegal topic of their discussions.